TAN PENG LOH

v.

LEE AIK FONG & ANOR.

FEDERAL COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN FJ
SALLEH ABAS FJ
[APPEAL NO. 109 OF 1980]
10 SEPTEMBER 1981

LABOUR LAW: *Employment - Injury of employee - Claim against employer a contributor under Employees' Social Security Scheme - Employee entitled to benefits under scheme - Whether ss. 31, 42 of Employees' Social Security Act 1969 ultra vires the Constitution - Whether employee precluded from claiming damages under common law for loss of amenities, pain and suffering - Sections 31, 42 Employees' Social Security Act 1969 - Article 160(2) Federal Constitution - Whether other damages recoverable in addition to payment recovered under Employees' Social Security Act 1969 from employer - Section 31, Employees' Social Security Act 1969.*

The appellant was an employee of the 2nd respondent, the owner of the motor lorry which was being driven by the 1st respondent at the time of the accident. The 2nd respondent was a contributor to the Employees' Social Security Scheme (SOCSO) under the Employees' Social Security Act 1969 (the "Act").

The learned trial Judge had found the 1st respondent to be solely to blame for the accident. He allowed with costs the appellant's claim under the Act against the driver and owner of the other motor lorry involved in the accident (1st and 2nd defendants at the trial). It was also argued that if, despite the provisions of the Act, damages could be recovered by the appellant, then damages, special and general, would be RM120,000.

At the trial, the appellant's contention was that:

(a) Sections 31 and 42 are *ultra vires* Articles 4(1) and 13 of the Federal Constitution.

(b) Appellant was not precluded from claiming general damages for the injuries as well as loss of amenities although he might be prevented from claiming special damages for loss of earnings.

(c) Appellant was not precluded from recovering damages from the 1st respondent (the lorry driver) who was not the employer of the appellant.

The learned trial Judge had held that:

(a) The Sections of the Act referred to are not *ultra vires* any of the constitutional provisions.

(b) Sections 31 and 42 of the Act have clearly extinguished the right of an employee of a common law remedy, the word "law" in s. 31 having the meaning assigned by Article 160(2) of the Federal Constitution.

(c) The injury in respect of which the plaintiff was claiming damages from the 1st defendant was the very same injury which formed the basis of his settlement under the Act and therefore the claim should be dismissed.

On appeal, the appellant abandoned ground (a). The appellant Court nevertheless stated its agreement with the Court below that the sections referred to are not *ultra vires* any of the constitutional provisions.

Held:

[1] Where an employee is entitled to recover payment from the employer under the SOCSO scheme for employment injuries as defined by the Act, he is debarred from receiving or recovering damages under common law for loss of amenities, pain and suffering. The trial Judge's reasoning was accepted completely. The words "any other law" in s. 31(ii) which disentitled an employee from recovering damages for employment injury under "any other law" covered the common law. The word "law" has the meaning assigned by Article 160(2) of the Federal Constitution. Federal Court Civil Appeal No. 10: of 1980 was referred to.

[2] The right to recover damages from a fellow employee in addition to payments recovered under the Act remains, in the absence of express exclusion of fellow employees under s. 31. It is presumed that Parliament does not intend to make any change in the existing law beyond that which I expressly stated in, or follows by necessary implication from, the language of the statute in question. If the arguments on a question of interpretation are "fairly" evenly balanced, an interpretation should be chosen which involves the least alteration of the existing law."

[The appeal against the 1st respondent was allowed with costs.]

Cases referred to:
Che Noh bin Yaacob v. Seng Hin Rubber (M) Sdn. Bhd. [1982] 1 MLJ 80
Bradburn v. Great Western Railway [1874] LR Ex 1

Legislation referred to:
Employees' Social Security Act 1969, ss. 3, 24, 31, (ii), 42
Federal Constitution, art. 4, 13
Employees' State Insurance Act 1948 [Ind], s. 53
Law Reform (Personal Injuries) Act 1948 [UK], s. 2

Other sources referred to:
Interpretation of Statues by Maxwell, 12th Edn., p. 116
The Quantum of Damages by Kemp & Kemp, Vol. 1 p. 152

For the plaintiff - Tara Singh Sidhu
For the defendants - H.R. Sankey

JUDGMENT

Wan Suleiman FJ:

The appellant (plaintiff in the Court below) was an employee of the 2nd respondent, the owner of the motor lorry which was being driven by the lst respondent at the time of the accident. The 2nd respondent was a contributor to the Employees' Social Security Scheme under the Employees' Social Security Act 1969 (hereinafter referred as to "the Act").

The learned trial Judge found that the 1st respondent to be solely to blame for the accident, allowing with costs the appellant's claim against the driver and owner of the other motor lorry involved in the accident (1st and 2nd defendants at the trial). It was also agreed that if, despite the provisions of the Act damages could be recovered by the appellant, then damages, special and general, would be RM120,000.

In the Court below, it was urged on behalf of the present appellant that:

(a) sections 31 and 42 are *ultra vires* Article 4(1) and Article 13 read together with Article 4 of the Federal Constitution;

(b) appellant is not precluded from claiming general damages for the injuries as well as loss of amenities although he might be prevented from claiming special damages for loss of earnings;

(c) appellant is not precluded from recovering damages from the 1st respondent (the lorry driver) who is not the employer of the appellant.

Before us, Counsel for appellant abandoned ground (a). We do not therefore propose to refer to this ground except to say that we agree with the Court below that the sections of the Act referred to are certainly not *ultra vires* any of the constitutional provisions.

In the Court below the learned Judge found that the injuries suffered by the appellant was employment injuries as defined in the Act, and before him, as it is before us, the question is whether the plaintiff appellant is entitled to receive or recover from the employer damages under common law, in view of s. 31 of the Act. Section 31 reads as follows:

> An insured person or his dependants shall not be entitled to receive or recover from the employer of an insured person:
>
> (i) any compensation under the Workmen's Compensation Ordinance 1952, or
>
> (ii) damages under any other law for the time being in force,
>
> in respect of an employment injury sustained as an employee under this Act.

We set out *verbatim* that part of his judgment dealing with this point:

> In my view s. 31 clearly prohibits the plaintiff or his dependants from receiving or recovering from his employer damages under any other law in respect of an employment injury sustained as an employee under the Act. The Act has very clearly extinguished the right of an employee to a common law remedy. The pertinent question to consider is whether the words 'any other law' cover the common law. My view is that they do.
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> The word 'law' has the meaning assigned by Article 160(2) of the Federal Constitution. (Interpretation Act 1967). Article 160(2) of the Federal Constitution defines 'law to include written law, the common law in so far as it is in operation in the Federation or any part thereof and any custom or usage having the force of law in the Federation or any part thereof. Apart from s. 31(ii) there is s. 42 of the SOCSO Act that must be borne in mind. It reads:
>
> > 42. When a person is entitled to any of the benefits provided by this Act, he shall not be entitled to receive any similar benefit admissible under the provisions of any other **written law**.

Section 42 prohibits an insured person from receiving damages from the employer under any other than the common law in respect of an employment injury. The plaintiff clearly became entitled to the benefits provided by the SOSCO Act and is therefore disentitled to receive similar benefit under any other written law.

This judgment was considered by this Court in *Che Noh bin Yacob v. Seng Hin Rubber (M) Sdn. Bhd.* [1982] 1 MLJ 80 and we wish to reiterate that we are in complete agreement with this part of the learned Judge's reasoning. In being disentitled or debarred from receiving or recovering damages under the common law, the appellant cannot therefore recover any damages for loss of amenities pain and suffering he might otherwise recover thereunder.

That leaves us with the remaining ground was the appellant precluded from recovering damages from the 1st respondent, the lorry driver?

We were referred to s. 53 of the Indian Employees' State Insurance Act 1948 (on which was understand, our Act is based) which reads as follows:

> 53. An insured person or his dependants shall not be entitled to receive or recover, whether from the employer of the insured person **or from any other person** any compensation or damages under the Workmen's Compensation Act 1923 of any other law for the time being in force or otherwise in respect of an employment injury sustained by the insured person as an employee under this Act.

It will be noted that except for the words "or from any other person", the wording is similar to our s. 31.

For the appellant it was urged that the omission of the words abovementioned is deliberate so as not to prevent an injured plaintiff from suing and recovering in damages from any person **other than the employer**.

In addition it was argued that whatever is recoverable from the 1st respondent cannot be reduced by this amount which is to be paid to appellant under the Act - as what he gets under the Act came from contributions towards the SOCSO fund, very similar to payment from an Insurance Company if he had been insured under an accident policy.

The learned trial Judge dismissed these arguments being of the view that the injury in respect of which appellant is claiming damages from 1st respondent is the very same injury which forms the basis of his entitlement under the Act.

With the deepest respect we disagree.

> It is presumed that the Legislature does not intend to make any change in the existing law beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute in question. It is thought to be in the highest degree improbable that Parliament would depart from the general system of law without expressing its intention with irresistible clearness, and to give any such effect to general words merely because this would be their widest, usual, natural or literal meaning would be to place on them a construction other than that which Parliament must be supposed to have intended. If the arguments on a question of interpretation an "fairly evenly balanced, that interpretation should be chosen which involves the least alteration of the existing law." (see *Maxwell on Interpretation of Statutes* 12th End., p. 116, and the cases in the foot-note).

It therefore follows that in the absence of express exclusion of fellow employees the right to recover damages from 1st respondent, a fellow employee remains.

We are also urged by Mr. Sidhu to apply the principle set out in *Bradburn v. Great Western Railway* [1874] LR Ex 1 the headnote of which reads:

> In any action for injuries caused by defendants negligence a sum received by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages.

Learned Counsel had, as we have remarked earlier, likened the contributions made by the employer, and in certain instances, by the employee to payments made under an insurance policy.

In England pensions, whether payable as of right of discretionary or non-contributory are likewise not deductible (see Kemp & Kemp on *The Quantum of Damages*, Vol. 1 page 152).

Section 2 of the Law Reform (Personal Injuries) Act 1948 is a statutory exception to the general principle provides as follows:

> (2) In action for damages for personal injuries (including any such action arising out of a contract), there shall in assessing those damages be taken into account against any loss of earning or profits which has accrued or probably will accrue to the injuries person from the injuries, one half of the value of any rights which have accrued or probably will accrue to him therefrom **in respect of industrial injury benefit, industrial disablement benefit of sickness or invalidity benefit** for the five years beginning with the time when the cause of action accrued ... (The emphasis is ours).

In the absence of such statutory provision we must perforce hold that payments recovered by the appellant under the Act are, in common law, not to be taken into account so as to reduce the damages recoverable by appellant.

In view of the finding of the learned trial Judge regarding damages, special and general, payable by the 1st respondent, we allow this appeal and order the 1st respondent to pay appellant RM120,000 and the costs of this appeal.

Deposit to be refunded to appellant.

Also found at [1981] CLJ 167